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No. 3

In the

Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, EX REL. AUDREY M. TOTH,
Petitioner,

v.

HAROLD E. TALBOTT, SECRETARY OF THE UNITED STATES AIR FORCE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN LEGION, AMICUS CURIAE

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Central Publishing Company, Indianapolis, Ind.

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No. 150

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UNITED STATES OF AMERICA, EX REL. AUDREY M. TOTH,

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HAROLD E. TALBOTT, SECRETARY OF THE UNITED STATES AIR FORCE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE AMERICAN LEGION, AMICUS CURIAE

PRELIMINARY STATEMENT

This brief is filed by The American Legion, Amicus Curiae, with the consent of the parties to this action, as required under Rule 42 (1), Revised Rules of the Supreme Court, effective July 1, 1954.

The American Legion is a non-political civilian organization composed of veterans of World War I, World War II and the Korean hostilities originally chartered by Act of Congress September 16, 1919 (U.S.C.A. Title 36, Sections 41-51, inclusive).

It is composed of fifty-eight (58) Departments, forty-nine (49) of which are located within the continental limits of the United States, which, in turn, are organized into Post or chapter organizations; and at the present time there are 17,195 Posts with a total membership of 2,779,964.

One of the cardinal purposes of the Legion, as provided by the Act under which it was incorporated (U.S.C.A. Section 43 as amended), is "To uphold and defend the Constitution of the United States of America." This is also the first precept in the Preamble to the Legion's Constitution. Consequently, it is vitally interested in seeing that the constitutional rights of veterans are fully protected.

The Petition for a Writ of Certiorari raises a number of questions which call for an interpretation of the Uniform Code of Military Justice (64 Stat. 107-145, 50 U.S.C.A. Section 551, et seq.) and the constitutional rights of veterans who have been honorably discharged from the Service and returned to a civilian status, but who may be charged thereafter with an offense under Section 3a of said code. The Legion fully supports the Petition and the reasons advanced by the Petitioner therein in support thereof.

Inasmuch as the parties have supplied the Opinions below, the jurisdiction of the Court, the questions presented, the full text of the relevant statutes involved, the statement of the case and its disposition, we shall avoid repeating them herein.

ARGUMENT

The basic question presented by the Petition for Writ of Certiorari is one of jurisdiction of the United States Air Force over the accused, Robert W. Toth. Under the Fifth Amendment "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, * * *."

Robert W. Toth had received an honorable discharge from the United States Air Force on December 9, 1952 (R. 12). He had served in Korea. On April 9, 1953, court martial charges were filed against him, accusing him of murdering and with conspiracy to commit murder against a Korean National. On May 13, 1953, which was several months after his honorable discharge and return to civilian life, he was arrested by the Military Forces and transported to Korea in connection with these charges. In view of the fact that the charges were not instituted until after the Petitioner had become a civilian, the very important question is presented as to whether the case arose in the land forces under the Fifth Amendment. While the Supreme Court, to our knowledge, has not construed this provision of the Fifth Amendment, yet it has interpreted the word "cases."

In Marbury v. Madison, 1 Cranch 137, Chief Justice Marshall defined a case as a suit instituted according to the regular course of judicial procedure.

Again in Osborn et al. v. The Bank of the United States, 9 Wheat. 738 at page 819, Chief Justice Marshall, after quoting from the first section, Third article of the Constitution declaring the extent of the judicial power of the United States, said:

> "This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States."

We can see no reason why there should be a different interpretation of the word "cases" under the Fifth Amendment than given that word under Article III of the Constitution.

In Ex Parte Richard Quirin (1942), 317 U. S. 1, at page 41, this Court stated:

> "We may assume, without deciding, that a trial prosecuted before a military commission created by military authority is not one 'arising in the land . . . forces,' *when the accused is not a member of or associated with those forces.*" (Italics supplied)

and again at page 43 the Court said:

> "The exception from the Amendments of 'cases arising in the land or naval forces' was not aimed at trials by military tribunals, without a jury, of such offenses against the law of war. *Its objective was quite different—to authorize the trial by court martial of the members of our Armed Forces* for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil courts." (Italics supplied)

Court martial jurisdiction cannot be exercised after discharge in connection with an alleged offense committed

against military law unless it has attached before separation from such service. Mosher v. Hunter (1944), 143 Fed. Rep. 2d 745.

Article 3(a) of the Uniform Code of Military Justice, admittedly is an attempt to extend jurisdiction to the military forces over a civilian whose military status has terminated, as it only applies in such instances.

The Congressional authority to adopt Art. 3(a) must rest upon some expressed or implied power extended under the Constitution. Article I, Section 8, Clause 12, providing authority "to raise and support armies" is not applicable, as Art. 3(a) does not provide that the accused shall be returned to a military status, even for the purpose of trial; nor does it rest upon the power of Congress to govern and regulate the land forces, (Article 1, Section 8, Clause 14) as the accused has been discharged from his military service and has returned to civilian life. Therefore, he could not be subject to such regulation; nor do we believe he is subject to the exception in the Fifth Amendment heretofore discussed. Flannery v. Commanding General Second Service Command, 69 Federal Supplement 661 (1946).

In the case of In Re Bogart, 3 Federal Cases 796; and several later cases, the court construed the word "cases", as used in the Fifth Amendment, as being synonymous with "events", which theory was followed by the Circuit Court of Appeals in the instant case. This interpretation is a violation of the fundamental canon for construction of Constitutional Provisions to the effect "that the provisions for the protection of life, liberty and property are to be largely and liberally construed in favor of the citizen". 11 Amer. Juris. 670, Sec. 59, Ex Parte In the Matter of Edward Lange, Petitioner, 18 Wall. 163, Ex Rel. Flannery v. Commanding General, supra.

The attempt on the part of Congress to subject civilians to military jurisdiction, under Article 3(a) of the Military Code, is an encroachment upon their civil rights. As stated by the District Court in this case—

> "This subject is a very serious one, as the Court sees it. One of the foundation stones of our Republic is that the civil power shall at all times be superior to the military power. 'It is a grave matter for military police to arrest a civilian and remove him for trial forthwith, without a hearing, to a distant point in this country or to a foreign country, as is the case in this instance, when there is no provision in any statute authorizing this to be done.'" Toth v. Talbott, 133 Fed. Supp. 330.

There is a further important legal objection to Article 3(a) of the Uniform Code. It is apparent that Congress under this Article intended to cover those crimes punishable by confinement of five years or more, but in reality even petty offenses are now included. Punishment is determined by the Table of Maximum Punishments as set out at Page 219 of the Manual for Courts Martial, United States 1951. In time of war, however, the Table is automatically suspended as to certain offenses (pages 217, Par. 127c, Manual for Courts Martial supra).

Furthermore, the Table was suspended in the Far East Command (under which the accused served) by the President of the United States under date of May 29, 1951, by Executive Order 10247, with reference to punishments for violations of Articles 82, 85, 86 (3), 87, 90, 91 (1) and (2), 113, and 115 of the Uniform Code of Military Justice. (See Appendix I).

As a result, minor offenses such as One Day Absence Without Leave, Article 86(3) of the Code, for which the usual punishment under the Table of Maximum Punish-

ments was three days at hard labor, is now "punishable" by confinement of five years or more, and honorably discharged offenders would be subject to the provisions of Article 3(a) of the Code.

Likewise, a violation of Article 87 of the Code (Missing Movement), which carried a relatively light punishment under the Table, is now also "punishable" by confinement of five years or more.

To subject discharged persons to arrest and removal to a foreign country for petty offenses is so lacking in due process as to constitute deprivation of constitutional guaranties.

The questions raised by the petition are of grave concern, not only to the American Legion, but also to the many discharged veterans who served their country in time of need, as the issue is the superiority of the civil power over the military power.

CONCLUSION

For the reasons hereinabove stated, we submit that the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia should be granted.

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APPENDIX I

EXECUTIVE ORDER 10247 (3 CFR—1951 SUPPLEMENT)

Suspending the limitations upon punishments for violations of Articles 82, 85, 86 (3), 87, 90, 91 (1) and (2), 113 and 115, of the Uniform Code of Military Justice.

By virtue of the authority vested in me by Article 56 of the Uniform Code of Military Justice (established by the Act of May 5th, 1950, 65 Stat. 107) and as President of the United States, I hereby suspend, until further order, as to offenses committed on and after May 31st, 1951, by persons under the command of, or within any area controlled by the Commander in Chief, Far East, or any of his successors in Command, the limitations prescribed by the Table of Maximum Punishments, Par. 127c of the Manual for Courts Martial, United States, 1951 (prescribed by Executive Order No. 10214 of February 8th, 1951); upon punishments for violations of Acts 82, 85, 86 (3), 87, 90, 91 (1) and (2), 113 and 115 of the Uniform Code of Military Justice.

HARRY S. TRUMAN

THE WHITE HOUSE
MAY 29th, 1951